Supreme Court, U.S.
FILED

961244 FEB 5 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

BEYONG CHUL CHOI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF PETER N. PRIAMOS
PETER N. PRIAMOS
18411 Crenshaw Boulevard
Suite 360
Torrance, California 90504

(310) 329-4700

Attorney for Petitioner
Beyong Chul Choi

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT IS CONSTRAINED, UNDER THE FEDERAL SENTENCING GUIDELINES, BY APPLICATION NOTE 2 TO 2B1.1 NOT TO USE REPLACEMENT VALUE AS AGAINST MARKET VALUE TO DETERMINE IMPRISONMENT RANGE?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contained the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, RULES AND REGULATIONS INVOLVED 1

STATEMENT OF CASE 2

STATEMENT OF FACTS 3

ARGUMENT 5

I. WHETHER THE COURT IS CONSTRAINED, UNDER THE FEDERAL SENTENCING GUIDELINES, BY APPLICATION NOTE 2 TO 2B1.1 NOT TO USE REPLACEMENT VALUE AS AGAINST MARKET VALUE TO DETERMINE IMPRISONMENT RANGE 5

CONCLUSION 8

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

STATUTES

18 USC Section 659 ..... 2, 3

28 USC Section 1254(1) 1

CONSTITUTIONAL PROVISIONS

Federal Sentencing Guidelines, Section 2B1.1 ..1, 2, 5, 7

Application Note 2 ..... 1, 2, 7, 8

PETITION FOR WRIT OF CERTIORARI

BEYONG CHUL CHOI, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 22, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed is a published opinion dated November 22, 1996, in United States Court of Appeals for the Ninth Circuit Case No. 96-50200, and is reprinted in the Appendix to this Petition, App. 1. The prior opinion of the United States District Court for the Central District of California, Case Number CR-95-00905-ABC, entered on April 4, 1996 is unpublished and is reprinted in the Appendix to this Petition, App. 5.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1996. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal Sentencing Guidelines, Section 2B1.1: Application Note 2. " 'Loss' means the value of the property

taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. When the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim."

STATEMENT OF THE CASE

This is an appeal of the Final Decision and Sentence whereby the Court felt constrained, as did sentence Petitioner, under Federal Sentencing Guidelines, namely 2B1.1, and application note 2, to use the market value of $351,000.00 instead of the replacement costs of $2,894.00 in setting an imprisonment level of 15 months on Petitioner versus zero to six months.

On September 18, 1995, a complaint was filed against Petitioner.

On September 18, 1995, a bench warrant was issued for Petitioner.

On September 22, 1995, an arraignment was here before Magistrate Judge as to Petitioner where he pled not guilty.

On October 10, 1995, an indictment was filed against Petitioner accusing him of violation of 18 USC Section 659, Possession of Stolen Goods in Interstate or Foreign Shipments.

On November 20, 1995, before the Honorable AUDREY B. COLLINS, Petitioner changed his plea to guilty of Count 1.

On April 1, 1996, the Honorable AUDREY B. COLLINS rendered sentence as to Petitioner imprisonment for 15 months, 3 years supervised release under the usual terms and conditions and make $1,000.00 restitution in amounts and times determined by the Probation Officer.

On April 3, 1996, Petitioner filed his Notice of Appeal to Circuit Court from the final judgment of conviction and sentence and from all pretrial orders entered in this action.

On November 22, 1996, the Court of Appeals affirmed the district court judgment of sentence.

STATEMENT OF FACTS

This was a criminal action brought by the United States of America against Petitioner, BEYONG CHUL CHOI ("PETITIONER" hereafter) for violation of 18 USC Section 659 for possessing stolen goods in interstate or foreign shipments. PETITIONER pled guilty to the Indictment. (Plea Agreement, Paragraph 2, page 1)

Sometime between July 29, 1995 and July 31, 1995, a tractor trailer containing interstate shipments was stolen from the Emerald Express Yard in Inglewood, California. The shipment was en route from Inglewood to Jamaica, New York, Indianapolis, Indiana, and Kansas City, Missouri.

The interstate shipments stolen included 2,944 Sony "Discman" portable compact disc players (Model D-242CK) and 274 cartons of Nike shoes.

On August 15, 1995, PETITIONER offered to sell to a YOON CHAN WHANG approximately 3,000 Sony "Discman" portable compact disc players (Model D-242CK) for $58 each. PETITIONER asked WHANG if he could sell the CD players to a buyer outside the United States. PETITIONER also offered for sale approximately 1,000 pairs of Nike shoes.

WHANG and other middlemen then arranged to sell the CD players to E&S International ("ESI" hereafter). ESI personnel requested documentation as to the source of the CD players. WHANG contacted PETITIONER, and PETITIONER was unable to provide any such documentation. ESI then told WHANG it had determined the CD players were stolen. WHANG then told PETITIONER the CD players were stolen, and said the deal was off.

The Federal Bureau of Investigation then became involved. At the request of the FBI, WHANG called PETITIONER to say that he had a buyer from Mexico willing to buy the CD players. PETITIONER agreed to the transaction and asked to be paid in cash. WHANG also asked PETITIONER not to mention the property was stolen, and PETITIONER agreed. PETITIONER also agreed to write a phony invoice for the CD players. PETITIONER was then arrested while loading the stolen CD players. (Plea Agreement, Paragraph 6, Page 2)

ARGUMENT

I. WHETHER THE COURT IS CONSTRAINED, UNDER THE FEDERAL SENTENCING GUIDELINES, BY APPLICATION NOTE 2 TO 2B1.1 NOT TO USE REPLACEMENT VALUE AS AGAINST MARKET VALUE TO DETERMINE IMPRISONMENT RANGE?

At the Sentencing hearing, the Honorable Audrey B. Collins stated the following:

> "I think the loss issue is an important one because it makes such a big difference in the calculations; however, constrained, as the Court is, by the sentencing guidelines, the application notes and the cases – and I've looked particularly at *Napier*, the Court tentatively finds that it must interpret loss as the amount taken – the full market value of what is taken, but I will hear argument on both of those issues if you wish to be heard at this time." (R.T.3)

Attorney PETER PRIAMOS argued as follows:

> "I would direct the Court's attention to the presentence report which I feel is a very fair report. 1 just disagree with the conclusion especially in light of paragraph 37 on page 7 . . .
>
> " 'According to a representative of Emerald Express (which is the victim, of course) it i8 difficult to estimate their final loss as many factors must be taken into consideration . . . ' "
>
> " 'The victim insure their freight for 50 cents a pound, having a total liability claim of approximately $7,821.50. The victim stated that their customers may not settle for this amount

and may demand total claimed value of their product . . . ' "

Attorney PETER PRIAMOS continued as follows:

"I asked the probation officer, your Honor, has anything there changed that would change that figure of $7,000.00 which, of course, is a lot different than $300,000.00 which, of course, changes the levels, and she honestly told me that, no, nothing has changed, that – so I think that the report reflects, when it says it's difficult to estimate their final losses, what really is a loss when you're talking about anticipated loss because they got back the CD's. Nothing was lost." (R.T. 4, 5)

Attorney PETER PRIAMOS stated the following:

"So, I would just ask the Court to – the presentence report itself – it sets forth all of the problems, and I just would hate to have the Court come down completely against the Defendant when he entered a plea at an offense level of 4, and, because of anticipated loss which is no loss at all, next thing you know, he's got an offense level of 14 or 15." (R.T. 6)

The Honorable AUDREY B. COLLINS then held:

"The Court does note that it makes quite a difference in this matter because, if it were a three-level increase for loss plus two levels for more than minimal planning, the offense level would be 9, and then minus 2 for acceptance of responsibility it would be 7 and at 7 and criminal history category I, the appropriate range would be zero to six months. Calculated as the Court has indicated, Probation calculates it and as the Government argues and as the Court feels

> constrained, the imprisonment range is 15 to 21 months which means the Court would have to sentence the Defendant to custody of at least 15 months, which I would. I would use the low term – whereas, under zero to six, it could be noncustodial time. Let's just see. Actually, 7 and 1 is zone A, so it could be straight probation without even the necessity for any supervised release.
>
> *The Court, just for the benefit of an appeal, if there is one, would indicate that, under the circumstances, if the Court could use the replacement value – in this case, I would be inclined to do so, so I am – in my opinion – constrained by application note 2 to 2(b)(1.1), and I will follow it, but just for the record in this case, I would – if I had the discretion to do so – or if I felt that were appropriate under the guideline manual – I would use the replacement cost . . . "* (emphasis added) (R.T. 13, 14)

The issue here, under the Federal Sentencing Guidelines Manual, Section 2B1.1 is whether the Petitioner should have a level of 7 (Base Offense Level 4 plus a loss calculation of more than $2,000.00 to add 3 for a level of 7, or to calculate a loss of $350,000.00 to add 11 for a level of 15.

Application Note 2 to Section 2B1.1 provides as follows:

> " ' "Loss" ' means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. When the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way,

such as reasonable replacement costs to the victim . . . "

In this case, Petitioner argues that under the Application Note 2 "Where the market value is difficult to ascertain or *inadequate to measure harm to the victim*", the Court may measure loss in some other way, such as reasonable replacement cost to the victim . . . the Court should have considered the replacement cost in rendering its Sentencing Decision.

With the replacement costs being less than $3,000.00 and the market value in the range of more than $300,000.00. It appears that the Court should consider the unreasonableness of such a large disparity between the market value and the replacement costs, and then come to a reasonable decision in rendering its Sentencing Decision.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

DATED: January 29, 1997

PETER N. PRIAMOS
Attorney for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BYEONG CHUL CHOI, aka Edward H. Choi, *Defendant-Appellant.*	No. 96-50200 D.C. No. CR-95-00905-ABC OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Submitted November 8, 1996*
Pasadena, California

Filed: November 22, 1996

Before: James R. Browning, David R. Thompson and
Sidney R. Thomas, Circuit Judges.

Per Curiam Opinion

*The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

SUMMARY

Criminal Law and Procedure/Sentencing

The court of appeals affirmed a district court judgment of sentence. The court held that market value determines the amount of loss for sentencing purposes despite police recovery of merchandise stolen from a freight company and the company's limitation of its liability.

Appellant Byeong Choi pled guilty to possession of stolen goods, CD players and shoes taken from an interstate freight company. The freight company had limited its liability on the stolen property to $2894.50. The police recovered the property. Choi pled guilty to possession. For sentencing purposes, the district court determined the loss according to the market value of $351,643 and sentenced Choi accordingly. Choi appealed.

[1] A district court must first look to market value when determining loss. When market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way. [2] Market value was not inadequate to measure the harm to the victim and the district court's only choice was to calculate loss using market value. [3] Although Choi argued that since police recovered the stolen property, no loss occurred, the amount of loss can mean potential loss had the defendant not been apprehended.

COUNSEL

Peter N. Priamos, Torrance, California, for the defendant-appellant.

Gregory J. Weingart, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

PER CURIAM:

After pleading guilty to possession of stolen goods in violation of 18 U.S.C. § 659, Byeong Chul Choi appeals his sentence. He argues because the interstate freight company from whom he stole Sony CD players and Nike shoes had limited its liability to $2,894.50, the court erred in determining loss according to the market value of $351,643. This resulted in an eleven point offense level increase pursuant to U.S.S.G. § 2B1.1(b)(1)(L). We affirm.

[1] A district court must first look to market value when determining loss. Application Note 2 to U.S.S.G. § 2B1.1 states, in pertinent part:

> "Loss" means the value of the property taken, damaged or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.

[2] Choi first argues that had the police not recovered the stolen property, the loss would have been limited to the amount of liability under the freight company's insurance contract, and that this amount would be a "reasonable replacement cost" under § 2B1.1. Choi's calculations omit some important factors. Had the police not reeovered the stolen property, it is true that the freight carrier may have only been liable for a contracted amount. But the remaining loss does not just vanish – if the manufacturers' recovery were limited by the freight company's insurance contract, the manufacturers would lose the difference between the market value and the liability amount. This difference, combined with the liability amount, is the *actual* replacement cost, and it is equal to the market value. Consequently, market value was not "inadequate to measure harm to the victim," and the district court's only choice under Application Note 2 was to calculate loss using market value.

[3] Choi additionally argues that since police recovered and returned the stolen property, no loss occurred. As this court has previously held, however, "the amount of loss can mean potential loss had [the defendant] not been apprehended." *United States v. Napier*, 21 F.3d 354, 355 (9th Cir. 1994); *see also United States v. Van Boom*, 961 F.2d 145, 146 (9th Cir. 1992) (attempted extortion punished as though completed for purposes of loss valuation); *United States v. Robinson*, 94 F.3d at 1329 (sentence properly enhanced by amount of intended loss in sting operation even though no actual loss occurred).

The judgment of the district court is AFFIRMED.

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA vs.

Defendant's Name
BYEONG CHUL CHOI

& Residence
333 South Kingsley Drive #126

Address
Los Angeles, California 90020

Docket No. CR - 95-905

Social Security No.
613-28-3264

Mailing Address
SAME

(RECD APR 4, 1996)

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
April	1,	1996

COUNSEL

[ ] **WITHOUT COUNSEL**
However, the Court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

[xx] **WITH COUNSEL**
Peter Priamos, Retained
(Name of Counsel)

PLEA

[xx] **GUILTY,** and the Court being satisfied that there is a factual basis for the plea.
[ ] **NOLO CONTENDERE** [ ] **NOT GUILTY**

FINDING

There being a finding/verdict of [ ] **GUILTY,** defendant has been convicted as charged of the offense(s) of:

Possession of Stolen Good in Interstate or Foreign Shipments, in violation of Title 18, United States Code, Section 659 and 3571(b)(3); as charged in the Single Count Indictment, a Class C Felony.

JUDGMENT AND PROB. COMMITMENT ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1964, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: Fifteen (15) Months on the Single-Count Indictment. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318;

2. If the amount of any mandatory assessment imposed by this judgment remains unpaid at the commencement of the term of community supervision, the defendant shall pay such remainder as directed by the Probation Officer;

3. The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service (INS), and if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. Within 72 hours of release from any custody or any reentry to the United States during the period of Court-Ordered supervision, the defendant shall report to the U.S. Probation Office, located at the United States Court House, 312 North Spring Street, Room 600, Los Angeles, California, for instructions;

In addition to the special conditions of supervision imposed above it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

[ ] This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed By [xx] U.S. District Judge
/s/ Audrey B. Collins
AUDREY B. COLLINS

[ ] U.S. Magistrate _____

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Dated Filed
April 2, 1996

FRANK E. GOODROE, CLERK.

By /s/ R.A. Klein
R.A. Klein, Deputy Clerk

Continued from Page 1

4. As directed by the Probation Officer, the defendant shall provide to the Probation Officer an accurate financial statement, with supporting documentation as to all sources and amounts of income and all expenses of the defendant. In addition, the defendant shall provide federal and state income tax returns as requested by the Probation Officer;

5. The defendant shall truthfully and timely file and pay taxes owed for the years of conviction, and shall truthfully and timely file and pay taxes during the period of community supervision, Further, the defendant shall proof to the Probation Officer of compliance with this order;

6. The defendant may travel outside the Central District of California for business purposes only, and only within the continental United States, with the approval of the Probation Officer and he must submit his itinerary to the Probation Officer at least one week in advance of his anticipated travel date.

Pursuant to Section 5E1.2(f) of the Guidelines, all fines are waived, including the costs of imprisonment and supervision, as it is found that the defendant does not have the ability to pay.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $50.00.

IT IS FURTHER ORDERED that the defendant pay restitution in the amount of $1,000.00, in such amount and at such times as determined by the Probation Officer.

IT IS FURTHER ORDERED that defendant remain at liberty on bond and he shall return to this court on July 15, 1996 at 1:30 P.M., for a status hearing, and or, surrender for service of term of imprisonment herein imposed.

The defendant is informed by the Court of his right to appeal pursuant to Rule 32(a)(2) of the Federal Rules of Criminal Procedure.

Signed By [xx] U.S. District Judge
[ ] U.S. Magistrate _____

/s/ Audrey B. Collins
AUDREY B. COLLINS

Dated Filed
April 2, 1996

FRANK E. GOODROE,
CLERK.

By /s/ R.A. Klein
R.A. Klein, Deputy
Clerk

Defendant: Choi, Byeong Chul Judgment
Case Number: 95-00905

RULE 32
FINDINGS AND STATEMENT OF REASONS

[X] The Court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 14

Criminal History Category: I

Imprisonment Range: 15 to 21 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 4,000 to $ 40,000

[X] Fine (including cost of prosecution, imprisonment and/or supervision) is waived or is below the Guideline range because of defendant's current and future inability to pay.

Restitution: $ 1000

[X] Full restitution is not ordered for the following reason(s):

Inability to pay

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court

finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

DATE: 4/1/96

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES
DISTRICT JUDGE